IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.2 OF 2007
IN
SECOND APPEAL NO.471 OF 2003.

Babu Budhala Nikam,
since deceased through legal
heirs and representatives
Baban Babu Nikam & ors. ..Petitioners
(heirs of org. appellant)

versus

Sou. Babai Dinkar Pawar
& Others ..Respondents.

Mr. Vinod Jadhav for the Petitioners

Mr. Dilip Bodake for Respondent Nos.1, 2 and 3a.

Coram : S.R.Sathe, J.
Dated : 3rd May, 2007

P.C.

1. Heard both the learned advocates.

2. The present petitioners are the heirs of original defendant in Regular Civil Suit No.211 of 1982. The respondents-original plaintiffs are the heirs of Babu Maruti -Phadtare. He filed a suit for declaration and injunction against the defendant alleging that though defendant is not having any right, title and interest in the suit property, he is obstructing the plaintiff’s possession of the

suit property. According to original plaintiff, the suit property was originally owned by Govind Balu Phadtare. Govind died leaving behind his wife Saraswatibai. He died issueless. After the death of Govind, his wife Saraswatibai @ Sarubai became the sole heir and owner of the suit property and started wahiwat of the suit property. On 19.8.1976 she sold the suit property to the original plaintiff and handed over the possession of the suit property to the original plaintiff. On 18.9.1982 when the original plaintiff started construction in the suit property, the original defendant obstructed. Hence, Balu Maruti Phadtare filed Regular Civil Suit No.211 of 1982 in the Court of CJJD, Waduj, for declaration and injunction and then by amending the suit made alternate prayer for possession of the suit property.

3. The above mentioned suit was strongly opposed by Bapu Badela Nikam, the original defendant. He contended that Govind who was the maternal uncle had executed a Will dated 11.02.1969 and bequeathed the suit property to him. Sarubai was not the owner of the suit property when she executed the sale deed in favour of the plaintiff

and as such plaintiff has no right, title and interest in the suit property. The defendant contended that he is infact the owner of the suit property by virtue of the Will.

4. The said suit was decided on merits and after considering the evidence adduced by both the parties, the learned trial Judge dismissed the plaintiff’s suit holding that the suit property was given to defendant under a Will.

5. Being aggrieved by the same, the original plaintiff filed appeal in the district Court, Satara. After hearing the arguments of both the learned advocates, the First Appellate Court came to the conclusion that though the defendant had technically proved that the Will was executed by Govind, still the plaintiff succeeded in bringing on record various circumstances, one of which was thatthe disposition of the property in favour of defendant who was not Class I heir and not giving any property to wife, though in fact during the lifetime of Govind, some property was standing jointly in the name of Govinda’s wife along with him. The First Appellate Court held that the

defendant failed to disprove the suspicious circumstance and he has not become the owner of the suit property. Naturally, the appeal was allowed and plaintiff's suit was decreed and defendant was directed to deliver possession within two months.

6. Being aggrieved by the same, the defendant filed Second Appeal No.471 of 2003. The same also came to be dismissed at admission stage itself as it was noticed that there was in fact no substantial question of law involved in the matter.

7. The present petitioners are the heirs of the original appellant in the Second Appeal No.471 of 2003. According to the present petitioners, neither they nor their father i.e. the appellant in the Second Appeal No.471 of 2003 were aware about the order of dismissal of the Second Appeal dated 21.6.2005 as the advocate of the appellant did not inform them about the decision. The original appellant in the second appeal died on 19.11.2005. Thereafter, when the petitioner's made query, the concerned advocate told that the matter is pending. Not only that, but thereafter the petitioners received the telegram from the advocate of the

original appellant on 29.1.2006 wherein it was mentioned "Start immediately with Rs.10,000/-. Your matter is on board." So, when he came to Bombay, he received the information about the dismissal of the appeal. Hence, he filed the present review petition.

8. The petitioner has stated that the then advocate for the appellant failed to point out that the findings of the First Appellate Court were without pleading regarding the suspicious circumstances of the Will and the First Appellate Court had failed to appreciate that the plaintiffs had not joined Sarubai as party in the original suit though she was alive. But the said points were not pressed by the then advocate in the second appeal. Hence, he has filed the present review petition.

9. The review petition is strongly opposed by the respondents. The learned advocate for the respondents submitted that the present petitioners were not party to the second appeal and as such they are not entitled to file the present review. However, they being the legal heirs of the original defendants and as they are aggrieved by the order,

it cannot be said that they have no locus to file the present review petition.

10. The main and the material point is whether the petitioner has made out a case for review. Merely because the then advocate of the appellant did not submit a particular point, it cannot be said that case falls under Order 47 Rule 1 of the Code of Civil Procedure. However, the learned advocate for the petitioner has drawn my attention to a case **Rekanti Chinna Govinda Chettiyar and others vs. S. Varadappa Chettiar and others A.I.R.1940 Madras 17,** wherein owing to the misrepresentation the Counsel for the respondents did not urge all his arguments in support of the finding recorded in favour of his client by First Appellate Court and the judge was led thereby to form an erroneous impressions that he had no arguments to meet the points raised by the appellant's counsel, it was held that it was analogous enough an error apparent on the face of the record to be sufficient reason for review under Order 47 Rule 1. However, the facts of the said case and the facts of the case in hand are quite different. This is not a case where the points that were to be argued by the appellant in Second Appeal

were not argued. While in the reported ruling owing to misapprehension the advocate had not agitated certain points. In the instant case, in fact the point which is now tried to be argued by the learned advocate was also argued. So, the above cited ruling is of no help to the present petitioner and I have no hesitation to hold that there is no substance in the argument advanced by the learned advocate for the petitioner in this behalf. In fact, it is needless to say that a mere repeatation through different Counsel of old and overruled arguments or minor mistakes of inconsequential merits are obviously insufficient for review.

11. The main point that was considered at the time of admission was whether there was in fact any substantial question of law. The point with regard to defendant acquiring title by virtue of a Will was considered and it was observed that the finding recorded by the First Appellate Court to the effect that the defendant has not acquired property by virtue of the will in question was upheld as there was no any error of law or in appreciation of evidence. So, under such circumstances, it is in fact necessary for the present petitioner to point

out that there is any mistake or error apparent on the face of the record. But the petitioners have failed to do so. The entire attempt of the learned advocate for the petitioner was to point out as to how the First Appellate Court has not properly appreciated the evidence on record and how he ought to have held that the defendant has become the owner by virtue of a will in question. So, he argued the matter as if it is the original hearing of the second appeal. The review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error apparent on the face of record. A review cannot be equated with original hearing. So, in my opinion, the present petitioner has utterly failed to make out a case for review of the order passed on 21.6.2005 whereby the second appeal was dismissed in limini.

12. Even if we assume for the sake of argument that the petitioner has made out a ground for review, and if we reconsider the appeal and see whether there is any substance in the argument advanced by the learned advocate for the petitioner, still then it appears that the First Appellate Court

has taken into consideration all the important and material facts and circumstances, including the fact that even after the alleged execution of a will the name of original defendant was not entered in the record or rights. On the contrary, Sarubai's name continued. Even at the time when Sarubai executed the sale deed of the suit property in favour of original plaintiff, the original defendant did not take any action. The first appellate Court has taken into consideration all the attending circumstances and rightly held that Govind had no intention to bequeath the property to plaintiff and Wiil is doubtful.

13. So, in view of the above discussion, there is no merit in the review petition. Hence the same is dismissed.

(S.R.Sathe, J.)